Your Witness

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Summary of CPR 35.6 approach

Following on from our brief look in the last issue at getting paid for answering question put under CPR 35.6 (Written questions to experts), now we consider in more detail questions put under this rule (see pages 4 & 5).

CPR 35.6 enables parties to seek clarification of an expert's report by means of written questions, the answers to which will then form part of the report. As you will see, the issues involved in answering questions are not quite as straightforward as they might seem from a quick reading of CPR 35.6 or the associated provisions of the Part 35 Practice Direction. For this reason, our advice is that, other than in the most trivial circumstances, you should **always establish that you have your instructing solicitor's (preferably written) permission before answering any questions** from another party on a report you have written.

The case of the ghostly instruction letter

We had a most bizarre situation reported on the *UK Register of Expert Witnesses* Helpline recently. Our member received by e-mail some instructions from a law firm, let's call it *Blagger & Co.* The instructions involved investigating a company's finances and preparing a report. Our member did what was asked of him and, in March this year, issued the final report along with his invoice.

Four months later, despite reminders, telephone calls and a final demand, the invoice remained unpaid. Our expert then instructed debt collection lawyers to recover the debt. *Blagger & Co* tried to wriggle out of the matter by claiming that its client, rather than itself, was responsible for the expert fees (the client – the company whose finances the expert had reported on – was now in liquidation).

When the expert's debt-chasing lawyers pursued the debt, *Blagger & Co* issued a copy of a letter of instruction that it claimed had been sent to the expert on the day the instructions had been e-mailed to him. It detailed a large number of instructions, together with a statement that the client would be liable for the fees.

Now, the expert has never seen this letter before and its timing and content are completely at odds with other documentary correspondence in the matter. Is it a work of fiction? Nevertheless, *Blagger & Co* is now suing the expert for professional negligence for failing to comply fully with its instructions and has refused to pay the fee note.

One wonders if the Supreme Court had this sort of vexatious nonsense in mind when it said that there would be little impact from their decision in *Jones -v- Kaney* to remove immunity from large swaths of expert witness work.

But there is a lesson to be taken from this expert's experience: **ensure you have clear and cogent written instructions in your possession before you start work** on an expert witness assignment. Not only is that a requirement of the CPR, it would also stop dead any attempt to fabricate instructions at a later date.

Legal Aid cuts deny access to justice

The Law Society is seeking judicial review of the Legal Services Commission (LSC) decision to meet just one-third of the costs of an expert witness report ordered by a county court on behalf of a child. This is one more in a growing catalogue of challenges made to the reforms of Jackson LJ and the planned legislation that has grown around it, all of which is scheduled to come into effect in April 2013.

The LSC declined to pay the full costs of the expert's report in a case where a district judge attached the full costs to a child's legal aid certificate because neither parent could afford to contribute. The court had ordered the report from a child and adult psychotherapist '*in respect of the child in particular and the family dynamics in general*'. The judge, who was aware of the parents' financial circumstances, ordered that the report's costs were to be funded by the child's legal aid, as it was regarded as '*a reasonable and necessary disbursement to be incurred*'. The LSC, however, argued that the child, and the parents, had jointly instructed the expert and so should share the costs equally between them. The review was heard at the end of October and a judgement is due in November.

The decision could have important implications because from April 2013 legal aid will be withdrawn from most private law proceedings, leaving more children as the only publicly funded parties to cases and more parents representing themselves.

New edition

Preparations for edition 26 of the *UK Register of Expert Witnesses* have begun. A draft of your entry for the new edition will be sent in the New Year for you to check, sign and return. **If you will be away during the first half of January** you may wish to contact us now so that we can make appropriate alternative arrangements.

Season's greetings

Everyone here at J S Publications sends their best wishes to you for a Happy Christmas!

Chris Pamplin

Choosing the right expertise

Matching expertise to the matters in question is crucial

In all cases involving expert evidence it is important to try to ensure that the expert selected has the necessary skills, qualifications and experience to provide a reasoned and valid opinion on the matters at issue. This may sound obvious and straightforward, but it is sometimes difficult to determine exactly what constitutes this and, in grey areas, what weight should be attached to the evidence of an expert whose experience does not match exactly the requirements of a particular case.

Patent difficulties

In *DataCard Corporation -v- Eagle Technologies*[1], the High Court considered the differing qualifications of the expert witnesses involved and set out principles for weighing these qualifications.

The case revolved around the validity of patents related to different aspects of the printing of plastic cards, such as credit cards. DataCard sued Eagle Technologies for two patent infringements. One related to a means of preventing the user from incorrectly installing a ribbon (Error Loading Patent); the other concerned the use of radio-frequency identification tags on printers and consumables employed to print identification documents such as passports and driving licences (RFID Patent). Under Section 3 of the Patents Act 1977, an invention shall be taken to involve an inventive step if it is not obvious to a person skilled in the art. Critical to the determination of obviousness was the composition of the 'skilled person', in this case a team of people.

The leading case considered by the court was *Mölnlycke -v- Procter & Gamble*[2]. In that case, the Court of Appeal had held that in assessing whether an invention was obvious, the primary evidence would be that of properly qualified expert witnesses. In general, a properly qualified expert witness was held to be someone in the relevant field at the relevant time.

Mostly expert

In *DataCard*, the claimant's expert witness was, on the face of it, eminently suitable. He had considerable experience in the field of card printers but not, it transpired, at the relevant time. He was an inventor named in many patents, including one of the patents cited as prior art against the RFID patent. However, at the date of the RFID patent, he had limited knowledge and experience of RFID technology.

Eagle Technologies' expert witness, on the other hand, had no involvement with card printers, but did have some experience at the relevant time with other types of printer and with RFID solutions for application in printer systems. He was felt to be sufficiently qualified (as a result of his general engineering experience and general knowledge of printers) to give admissible expert evidence in relation to the Error Loading Patent, but was much less well qualified to speak on that patent than DataCard's expert. However, he was better qualified to assist the court in relation to the RFID Patent than DataCard's expert.

Defining the 'skilled person'

The court considered the statement of Lord Justice Jacob in *Rockwater -v- Technip France SA*[3]. He said that it was not helpful to approximate real people to the notional 'skilled person'. Instead, the question to be determined was whether the expert witness's reasoning and ability were sufficient to teach the court.
In reaching this decision it was relevant to consider the extent to which the expert witness's qualifications (as opposed to his or her degree of inventiveness) approximated to those of the 'skilled person'. If one expert was in the field at the relevant time, and particularly if he or she considered the problem to which the patent is addressed at that time, then that expert witness's evidence would be likely to carry more weight than that from another not in the field at the relevant time, even if that expert was, on the face of it, more qualified.

Consequently, although DataCard's expert witness was more likely to be able to speak to the perception of the 'skilled person', this did not mean that that expert's opinion should necessarily be accepted. It was still necessary to consider the cogency of the expert's reasons.

Against this was weighed the lack of specific experience of Eagle Technologies's expert in card printers which, to some extent, had been offset by his general engineering knowledge and his involvement with similar (but not identical) technology at the relevant time.

Don't rely on my chap, he's not that expert!

In this case, counsel for the claimant sought to exploit the lack of specific knowledge of printer design by Eagle Technologies's expert with a view to discrediting his evidence. But then, in his closing submissions, he relied heavily on that same expert's statements regarding the validity of the Error Loading Patent. The court was then subjected to the spectacle of the defendant's counsel countering this tactic by submitting that his expert was not properly qualified to assist the court in relation to that patent! All in all, a most unsatisfactory position for both parties and for the court!

Summary

This case highlights the need for extreme care when selecting expert witnesses, particularly if there are separate and distinct areas of expertise involved. It also illustrates the factors that the court will consider when weighing the admissibility or probative value of expert opinion. While it is important to ensure that an expert witness is properly qualified in the appropriate field, it is also important to ensure that the expert's knowledge and experience is in that field *at the relevant time*.

References

[1] *DataCard Corporation -v- Eagle Technologies Ltd* [2011] *EWHC* 244 (Pat).

[2] *Mölnlycke AB -v- Procter & Gamble Ltd* [1994] RPC 49.

[3] *Rockwater Ltd -v- Technip France SA (formerly Coflexip SA)* [2004] *EWCA Civ* 381.

Proving professional negligence

Is expert evidence needed to prove professional negligence?

A key role of the expert witness is to help the court with matters that are outside the ordinary understanding of a layman. There are, consequently, many areas of dispute that would be almost impossible to effectively and justly rule upon without the input of a properly qualified expert. This includes cases that involve questions of professional negligence.

For a professional negligence claim to succeed, it is necessary to prove, on a balance of probabilities, that the standard of care and degree of skill and competence exercised by the professional fell short of that which might have been expected from a reasonable and suitably qualified member of that profession. To discharge this burden of proof, it would be imperative to produce expert evidence as to the extent of knowledge and skill that a reasonable professional in the same field would possess – or so one might suppose.

This was the view taken in the judgment of Coulson J in *Pantelli -v- Corporate City Developments*[1]. His judgment in that case highlighted the importance of expert evidence in professional negligence claims. The defendant in *Pantelli* sought to strike out the claim on the grounds that no expert evidence had been adduced in support, despite the fact that three years had elapsed since the purported negligent work had been completed. It was, said the judge, '*wholly inappropriate*' to make an allegation of professional negligence if there was no '*expert input*' to support the allegation. Allowing the strike-out application, Coulson said that it was:

> *'... a matter of common sense: how can it be asserted that act x was something that an ordinary professional would and should not have done, if no professional in the same field had expressed such a view?'*

The judgment in *Pantelli* has generally been taken to mean that expert evidence is essential to prove professional negligence claims, and that the lack of such evidence is a sufficient reason to strike out a claim.

However, in the recent case of *ACD -v- Overall*[2] the court has held that this is not necessarily so. In *ACD*, a firm of architects sued for its unpaid fees for a report on a property on which the defendant was seeking planning permission. The defendant counterclaimed, claiming breach of contract and negligence in the preparation of the architect's report. It was asserted that, had the claimant prepared the report properly, the defendant's application for planning permission would have succeeded, resulting in the value of the property increasing significantly. The defendant did not serve expert evidence in support of its counterclaim (and made it clear that it had no intention of doing so); relying on *Pantelli*, the claimant made an application to strike it out.

Prior to the hearing of the strike-out application, the defendant did serve expert evidence. However, the claimant went ahead with a view to recovering the costs of the application.

Although this was now only an application for costs, the court did take the opportunity to consider the broader picture in relation to the necessity for expert evidence.

Akenhead J commented that *Pantelli* had not established an immutable rule that professional negligence could only be pleaded once the claimant had amassed supporting expert evidence. He noted that statements of case must be supported by a statement of truth. A party may believe the facts in the statement of case to be true, even where no expert evidence has yet been retained to support allegations of professional negligence. He also pointed out that expert evidence is not required in some cases of professional negligence, including a solicitor's negligence.

The judge took the view that, in relation to costs, it may be disproportionate for expert evidence to be obtained at a very early stage in the case, particularly if the amount in issue is small or there is a sensible prospect of settlement.

In *ACD*, some elements of the counterclaim, such as breach of contract, were matters of fact that could be proved without the need for expert evidence. Consequently, an application to strike out would not have succeeded, at least in relation to this element.

Where there were obvious elements of a claim or counterclaim that would require expert evidence, it was reasonable for a party to bring this to the attention of the court. This would be particularly so if the party pleading professional negligence:

- made it clear that it did not need expert evidence
- gave a clear impression that it had no intention of securing expert evidence, or
- pursued the claim for a long time without securing expert evidence.

However, the judge did not think that a 'heavy-handed' application to strike out was necessarily the right approach. Instead, it might have been more appropriate to bring the matter to the attention of the court at the first case management conference. This would give the court the opportunity to consider, at that stage, whether expert evidence was needed to prove any part of the issues in dispute.

The case provides useful guidance regarding the necessity for expert evidence in professional negligence cases. Where the issues are such that expert evidence will obviously be needed, it suggests that considerations of cost might mean that the obtaining of such evidence could be deferred to a later stage if there is a reasonable prospect of settlement or the amounts at issue are relatively modest. Lastly, the need for and lack of such evidence is something that a party should bring to the attention of the court. However, it might not, except in extreme cases, be an appropriate ground for a strike-out application.

Expert evidence is not always needed to prove negligence

References

[1] *Pantelli Associates Ltd -v- Corporate City Developments Number Two Ltd* [2010] EWHC 3189 (TCC).

[2] *ACD (Landscape Architects) Ltd -v- Overall & another* [2012] EWHC 100 (TCC).

To answer or not to answer... that is

Questions that appear to be improperly put

A recent call to our *UK Register* Helpline raised the query, once again, as to whether questions put to an expert under Civil Procedure Rules (CPR) Part 35.6 should be answered. Our member had received 35 questions that appeared to go beyond clarification, to be disproportionate and to relate to new evidence (that had also been sent to our expert). What should the expert do?

CPR 35.6 Written questions to experts

CPR 35.1 states that '*expert evidence shall be restricted to that which is reasonably required to resolve the proceedings*', and this objective is achieved by putting the calling of expert evidence under the complete control of the court (Rule 35.4). Furthermore, Rule 35.5 provides that evidence will be given in a written report '*unless the court directs otherwise.*' Clearly, though, there are dangers in a court receiving expert reports that have not been scrutinised for inconsistencies and ambiguities and whose authors may not be cross-examined on them. Hence, the countervailing provision (Rule 35.6) that enables parties to seek clarification of an expert's report by means of written questions, the answers to which will then form part of the report.

For a rule that is so simple and straightforward, it is surprising how often experts and lawyers have problems with it. When we conducted a survey of readers's experiences while acting as single joint experts (SJEs) in the early days of the CPR, of 60 respondents who had been instructed as SJEs at least 10 times, nine thought that the number of questions asked was generally excessive. One surveyor had no fewer than 54 questions put to him about one of his reports, while an occupational therapist had notched up 76 questions on one of hers. There are, however, special considerations concerning the questioning of SJEs that we will touch on later.

It is not just our readers who have encountered problems with the procedure. Instances have been reported in other journals of experts receiving several successive batches of questions. Others have had questions sent to them months after their reports were exchanged. And at least one expert claims to have been asked questions in persuance of the rule by telephone!

Interpretation of court rules is a matter for lawyers, not experts

Leave it to the lawyers to sort out

It cannot be stressed too strongly that Rule 35.6 was never intended to provide a substitute for cross-examination, still less a means for intimidating an opponent's expert. However, the issue of what constitutes excessive or onerous questioning has yet to be tested in court. When it is, the case will almost certainly be decided on grounds of proportionality. In other words, it will be judged in relation to the amount of money at stake, the importance of the case, the complexity of the issues and the relative financial positions of the parties. Clearly, these are matters for lawyers, not the experts they instruct, and this is why we believe it best that experts leave it to the lawyers to decide what needs to be done about any apparent abuse of the procedure.

There are various courses of action open to a solicitor whose expert has been sent questions that seem excessive in number or otherwise impermissible.

1. **Remonstrate with the solicitor** who sent them and endeavour to persuade him or her to modify them.
2. **Apply to the court to have the questions disallowed**.
3. **Accept the situation and instruct the expert to answer** the questions – most likely if the solicitor suspects that the court may be glad to have the additional information.

Cost

In dealing with issues of this kind, two considerations will be uppermost in the minds of the lawyers on both sides, and one of these is cost. The Practice Direction requires that when an expert answers questions put in accordance with Rule 35.6, it is his or her instructing party (and in practice that means instructing solicitor) who must pay the expert for answering them. Although at first sight this may seem odd, it is in fact sensible because the two are already in a contractual relationship and will have – or, at least, should have – agreed the basis on which the expert is to charge his or her fees.

In any event, as the Practice Direction also reminds us, this does not mean that the client will necessarily foot the bill. If the case is won, the cost of answering the questions should be recoverable from the party that put them. And even if the case is lost, the winning party could still be ordered to reimburse the loser for the cost of having questions answered if the court finds that they were excessive or otherwise out of order.

Risk of delay

The other consideration that should be exercising the lawyers running the case is the effect that asking questions of an expert may have on keeping to any timetable the court has imposed.

Nowadays, the great majority of cases – perhaps as much as 80% of them – are allocated to the fast track. For cases on that track, no more than 30 weeks should elapse between allocation and trial. Typically, in such cases, the court will require that expert reports be exchanged within 14 weeks of allocation, leaving just 16 weeks for the lawyers to complete all the remaining stages.

Let's consider for a moment what that involves. The party receiving the report of its opponent's expert has 4 weeks in which to consider it, consult its own expert about any aspects it does not understand, and, if necessary (and with the expert's help), frame questions to put to the author of the report. Then, if the party is lucky, it will receive replies to its questions in another month, by which time the trial date may be only 8 weeks away. All this should, as they

say, concentrate minds wonderfully on keeping questions short and to the point, and not asking more of them than is absolutely necessary – though, sadly, it does not always do so.

Meaning of 'clarification'

Clause (2) of Rule 35.6 ends with an important proviso that is still, on occasion, overlooked by litigants and their advisers. It enables written questions:

- to be **put more than once**
- to be **put more than 28 days after reports have been exchanged**, and
- to be **put for purposes other than clarification**

if the court gives permission or the parties agree.

The kinds of question that might be permitted that went beyond clarification was the issue before the Court of Appeal in *Mutch -v- Allen*, a case we reported in *Your Witness* 25. The Court of Appeal ruled that a court is entitled to all the evidence relevant to its decision in the most cost-effective and expeditious way. To that end, **it is legitimate for a party to ask questions of an expert witness in extension**, as well as clarification, of his or her report – providing, that is, the question deals with a material point the witness did not cover in the report, even though it was within his or her expertise.

Always seek permission first

Clearly, the issues involved in answering questions are not quite as straightforward as they might seem from a quick reading of the rule or the associated provisions of the Part 35 Practice Direction. For that reason, our advice to experts is that, other than in the most trivial circumstances, experts should **always establish that they have their *instructing* solicitor's permission before answering any questions** from another party on a report they have written.

If the questions have been submitted via the instructing solicitor with a request that the expert responds to them, all well and good. Even here, though, there is a possibility that the solicitor may not have appreciated just how much work might be entailed in answering them. In such circumstances, he or she may well appreciate a quick note enclosing an estimate of the time it will take to comply with the request and a reminder of the expert's fee rate. That should produce an equally prompt response either confirming or countermanding the previous instruction.

The need for a party-appointed expert to seek permission to answer questions is even greater if questions have been forwarded by or on behalf of his or her instructing solicitor without specific instructions, or if they have come direct from the questioning party. Although the Practice Direction requires that any question sent direct to an expert be copied to the party or parties by whom he or she has been instructed, that does not always happen. Without checking, therefore, there is always a risk that the instructing solicitor may not have seen the questions, or considered the implications of the expert answering them, before work begins.

Answering the questions

Once the expert has been given the go-ahead, the task of answering the questions should be started as quickly as possible. The rule lays down no time limit for this. If the case is on the fast track, though, time will already be pressing. In such circumstances, the parties would doubtless appreciate a faster turnaround.

If the expert should anticipate any difficulty in replying within a suitable time scale, both parties should be advised of the estimated delay. They can then be left to consider whether to make a joint application to the court.

Experts should always bear in mind that answers to questions put in accordance with Rule 35.6 automatically form part of an expert report. They are therefore covered by the Statement of Truth included in that report. In particular, answers must represent the expert's '*true and complete professional opinion*'. For similar reasons, experts should be wary of allowing their answers to betray any of the irritation or annoyance they may feel about being asked to 'clarify' a report that they regard as crystal clear. It is for the court to decide whether the questions were necessary and, if it sees fit, to penalise the party asking them.

Finally, when the answers are ready, they should be sent direct to the party that put them. In addition, two copies should be sent to the expert's instructing solicitor, with the request that one copy be forwarded to the court. The expert will no doubt want to enclose with these copies an invoice for the additional work done.

Ensure instructing lawyer agrees that questions can be answered

Single joint experts: a special case

Rule 35.6 applies to all experts, whether they have been appointed by one party or jointly by two or more. For SJEs, though, the demands placed on them by the rule can be more onerous. SJEs may well find, for example, that they have several sets of questions with which to contend. Even if only one of the parties puts questions, the SJE will need to keep all parties informed of what is being done about them. In particular, the SJE should advise the parties of any problems he or she may have with the questions or with answering them as quickly as the parties require. Lastly, of course, the SJE should appraise all the parties of the likely cost of answering the questions received, because each will be jointly and severally responsible for paying for this.

As before, our advice to experts for dealing with issues such as these is to **let all parties know how matters stand and leave them to resolve any problems that emerge**. It is only as a last resort that an expert should do what some authorities recommend and apply to the court for directions to that end.

SJEs must take extra care to involve all the parties

Switching experts

Court loathed to permit new expert instruction even when expert opinion changed

In these days of austerity and with a cost-conscious judiciary, less leeway is likely to be given to parties in matters of procedure, including late applications to call expert evidence.

Charles Terence Estates Limited

In *Charles Terence Estates Limited*[1], the court dismissed an application to adduce expert evidence that was made 2 weeks before a scheduled trial date. In refusing the application, Coulson J considered the relatively few authorities that exist in relation to the exercise of the judge's discretion in granting such applications. These included the case of *Swain-Mason*[2] in which the Court of Appeal gave guidance as to the interplay between the overriding objective and interlocutory applications made late and close to trial. Coulson J attached particular relevance to the words of Lord Justice Lloyd that:

> *'... it is always a question of striking a balance. I would not accept that the court [seeks] to lay down an inflexible rule that a very late amendment to plead a new case, not resulting from some late disclosure or new evidence, can only be justified on the basis that the existing case cannot succeed and the new case is the only arguable way of putting forward the claim. ... However, I do accept that the court is, and should be, less ready to allow a very late amendment than it used to be in former times, and that a heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the court.'*

Guided by this, Coulson J sought to follow similar lines and gave some helpful guidance in his judgment. He indicated that in allowing or dismissing an application to adduce late expert evidence the court should consider:

- the **importance** of the application in the context of the case as a whole. Is the expert evidence in question reasonably required to resolve the proceedings?
- the **justification**, if any, for the delay
- the **consequences** if the application was allowed and the consequences if the application was refused.

In *Charles Terence Estates*, Coulson J could see no justifiable reason for the delay, and neither was he persuaded that the expert evidence in question was reasonably required to resolve the proceedings.

In reaching his judgment, he next weighed the consequences of both allowing and refusing the application. He was mindful that allowing the application would inconvenience the innocent party, who would also be left with other disadvantageous consequences. Conversely, refusing the application would preserve the trial date, spare inconvenience to the innocent party but deprive the applicant's ability to call expert evidence on a peripheral matter. He concluded that any prejudice to the applicant was slight and was, anyway, a consequence of its own failure to comply with an earlier order.

Guntrip

The Court of Appeal gave further guidance in April 2012 when Lord Justice Lewison delivered his judgment in *Guntrip*[3]. In that case the court considered a claimant's application for permission to adduce evidence from a new expert witness after the parties's experts had produced a joint statement.

The claim was one of negligence against an employer for injuries sustained while driving in the course of employment. Each side instructed an orthopaedic surgeon, and the two experts produced a joint statement following their meeting. The joint statement was not supportive of the claimant's case, and the claimant sought permission to instruct a fresh expert. The district judge refused permission, so the claimant appealed to a circuit judge who overturned the decision on the grounds, *inter alia*, that:

- the claimant's case would fail unless he was permitted to change his expert and that this took the case outside the ambit of previous authority, and
- the district judge had overstepped his discretion by considering the content and value of the proposed new expert's evidence.

Leave was given to refer the matter to the Court of Appeal.

The Court of Appeal was required to consider two factors when hearing the application. First, the broader question of whether new expert evidence should be allowed when an expert has changed his mind and, second, whether it was right to permit such fresh evidence at a relatively late stage in the proceedings having regard to the effect on time and costs.

When an expert's opinion changes

Dealing with the broader question, Lord Justice Lewison said that the expert's overriding duty applies not only to the preparation of an initial report, but also to the preparation and agreement of a joint statement, as well as to evidence given orally in court. If at any time the expert can no longer support the case of the instructing party, it is the expert's duty to say so. Indeed, if the expert forms that view it is far better to say so sooner rather than later before the litigation costs escalate.

It is partly because an expert's overriding duty is to the court that the court discourages expert shopping, particularly when a party has had a free choice of expert and has put forward an expert report as part of its case. The party must adduce good reasons for changing the expert. The mere fact that the chosen expert has modified or even changed his or her opinion is not enough. After all, the change of opinion may well be based on new evidence, e.g. observations

References

[1] *Charles Terence Estates Limited -v- Cornwall Council* [2011] *EWHC* 1683 (QB).

[2] *Swain-Mason & Others -v- Mills & Reeve (a firm)* [2011] *EWCA Civ* 14.

[3] *Guntrip -v- Cheney Coaches Ltd* [2012] *EWCA Civ* 392.

from the expert for another party.

In exercising his discretion in accordance with the overriding objective, a trial judge is required to deal with cases justly. Justice does, of course, involve justice to the defendant as well as the claimant. The Court of Appeal held that the trial judge had exercised his discretion correctly and had considered the effect on both parties.

Case management considerations

Moving to the question of time and costs, the Court of Appeal affirmed that the overriding objective also involves:

- saving expense
- dealing with the case proportionately, and
- ensuring that it is dealt with expeditiously.

Necessarily, this means that decisions are fact-sensitive and case-specific.

In addition, the court is, and should be, less ready to allow a very late amendment than it used to be. A heavy onus now lies on a party seeking to make a late amendment to justify it with regards its own position, that of the other party to the litigation and that of other litigants in other cases before the court. Although these principles have been applied to amendments to statements of case, they apply equally to a late change of expert.

Lord Justice Lewison cited what he referred to as two relevant and important points in Lord Justice Jackson's report on civil litigation costs. First, that courts at all levels have become too tolerant of delays and non-compliance with orders, and that:

> *'... in so doing, they have lost sight of the damage which the culture of delay and non-compliance is inflicting on the civil justice system.'*

Second, he quoted the words of Lord Justice Jackson, that it was:

> *'... vital that the Court of Appeal supports first instance judges who make robust but fair case management decisions.'*

Whether to grant a party permission to adduce expert evidence, particularly where the application involves a change of expert, is a case management decision. It is a *discretionary decision* entrusted by the rules to the first-instance judge. The discretion must, of course, be exercised judicially, having regard to the overriding objective. Lord Justice Lewison took the view that the real issue in this appeal was not whether the circuit judge had exercised his discretion correctly, but whether he was entitled to interfere with the district judge's exercise of his discretion. Lewison held that he was not, and ruled that the district judge's original decision not to allow the change of expert should stand.

Conclusion

The later the application to change expert, the less likely it is to be granted. This is particularly so if there is any suggestion that in doing so the trial date will be put in jeopardy.

Welsh law

Experts who practice in the courts of England and Scotland will be aware of the differing rules and procedures pertaining to both jurisdictions. We have, in the past, reported on issues relevant to experts that had the potential to confuse both north and south of the Border. There are, for example, subtle differences in the tests for medical negligence and the expert evidence required to prove it. There are also significant differences in the statutory and common law relating to employment.

At present there are three legal jurisdictions in the UK. Scotland and Northern Ireland are two and England and Wales is the third. However, there is now a distinct possibility that we will have a fourth jurisdiction in the not-too-distant future.

A Welsh government consultation, '*A separate Legal Jurisdiction for Wales*', closed on 19 June 2012 and the outcome is now awaited. A decision is expected by the end of 2012.

Following the 'yes' vote in the referendum on the powers of the National Assembly for Wales held in March 2011, the provisions of the Government of Wales Act 2006 were brought into effect. They enabled the Assembly to pass primary legislation in relation to all devolved subjects. Amongst other things, this means that it is no longer necessary for the consent of the UK Parliament to first be obtained before the National Assembly can legislate in relation to those devolved subjects.

There is already a growing body of legislation that is different in Wales from that in England (e.g. the Rights of Children and Young Persons (Wales) Measure 2011). This divergence between the law in Wales and that in England (which is now likely to become significantly greater) has resulted in calls from some quarters for separate legal systems to administer them.

While the possibility is acknowledged that England and Wales may continue to share some of its courts and legal institutions, one of the questions posed by the consultation is the extent to which Wales should have changes made to its courts and tribunals, judiciary, legal professions and their regulation, education and training.

The Welsh government has also called for the UK Supreme Court to have a Welsh judge among its justices (of which there are currently none) to better reflect the devolution settlement. Currently, the Supreme Court has one justice from Northern Ireland and two from Scotland, in addition to those from England.

The extent to which a Welsh jurisdiction (or perhaps we should say *awdurdodaeth Gymreig* if Google Translate is to be trusted!) is likely to affect practitioners in the courts, including experts, remains to be seen, but any major effects are likely to be some years away.

Use of English law in Welsh courts may soon stop

Call for a Welsh judge in the Supreme Court

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